IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 323

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Petitioner,

vs.

STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, Also Known as Edward W. Gamer, Deceased,

Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

I.

It is contended by counsel for respondent that the decision of the Circuit Court of Appeals of the Ninth Circuit (Gamer v. New York Life Insurance Company, 76 F. .....2d....., 543) reversing the judgment of Judge Bourquin granting defendants' motion for a directed verdict, and the decision of the same Court (New York Life Insurance Co. v. Gamer, 90 F. .....2d.....817) sustaining the judgment entered upon the second trial of the case, "preclude any further right upon the part of petitioner herein to have reviewed the decision of the trial court holding that under the facts presented the question of suicide or accidental death was for the jury, or to have reviewed the decisions of the Circuit Court of Appeals so holding." (Respondent's Brief, page 6.)

In other words, it is now contended by respondent that the two decisions of the Circuit Court of Appeals of the Ninth Circuit, whether right or wrong, become the law of the case.

This proposition is untenable, for the reason that a prior decision of a Federal Circuit Court of Appeals is not the law of the case for the Supreme Court when reviewing a later decision of the former court in the same case.

> Messinger v. Anderson, 225 U. S. 436, 32 Sup. Ct. 739, 56 L. Ed. 1152;
>
> Panama R. Co. v. Napier Shipping Co., 166 U. S. 280, 24 Sup. Ct. 572, 41 L. Ed. 1004;
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> Diaz v. Patterson, 263 U. S. 399, 44 Sup. Ct., 151, 68 L. Ed. 356;
>
> Burnrite Coal Briquette Co. v. Riggs, 274 U. S. 208, 47 Sup. Ct. 578, 71 L. Ed. 1002.

And in Messinger v. Anderson, 225 U. S. 436, 56 L. Ed. 1152, 32 Sup. Ct. 739, this Court, speaking through Mr. Justice Holmes, said:

> "In the absence of statute the phrase 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not to limit their power."

Further, the ruling on a prior appeal in a particular case will not be adhered to as the "law of the case" where the Court is convinced that it ought not to stand.

> United States v. Bollman (CCA 8th) 81 F. (2d) 1009.

In the case of Higgins v. California Prune, etc., Inc. (CCA 2nd), 3 F. (2d) 896, the Court said:

> "Whatever may be said of earlier decisions, it is now well settled that the 'law of the case' does not rigidly bind a court to its former decision, but is only addressed to its good sense."

Illinois Cent. Ry. Co. v. Crail (CCA 8th), 31 F. (2d) 111.

II.

Cases Relied Upon By Respondent.

Home Benefit Association v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 25 L. Ed. 1160.

This case is not in point and has no application here, for the reason that it was based upon a policy of life insurance, containing an exception of liability in case of suicide. In such a case, it is settled that the burden is upon the defendant to plead and prove the exception.

Jefferson Standard Life Ins. Co. v. Clemmer (CCA 4th), 79 F. (2d) 724;

Federal Life Ins. Co. v. Zebeck (CCA 7th) 82 F. (2d) 961, 963.

In the case at bar, the insurance over which this controversy arises was against accident, and the burden was of course on the plaintiff to prove an accidental death, which proof in itself would negative suicide.

New York Life Insurance Co. v. Ross, 30 F. (2d) 80:

In the Ross case, it is stated: "The plaintiff introduced evidence tending to prove purely accidental cause of the injury, and evidence was introduced on behalf of the defendant below, tending to prove motive for suicide." (Page 81.)

In the case at bar, there is no evidence of accident, and the only possible theory upon which the case was submitted to the jury was that, as the court told the jury, the presumption of law is that the insured did not commit suicide, and this presumption has the force and effect of evidence, and is binding on the jury and they must find according to such presumption, until it is overcome by evidence satisfying them that the presumption is not according to the fact. (263 R.) This declaration is contrary to the decisions of this Court. (Del Vecchio v. Bowers, 296 U. S. 280, 56 S. Ct. 190, 80 L. Ed. 229, and other cases cited in the Petition and Brief in Support Thereof.)

It is further stated in the Ross case:

> "The only questions here are whether the court erred in charging that the burden of proof shifted to the defendant and the presumption remained throughout in aid of the plaintiff's case or until overcome by a preponderance of evidence.
>
> "As regards established principles of general application, this charge is open to objection for want of accuracy. A presumption is not evidentiary in its nature, and the burden of proof, in its usual and primary meaning as the risk of nonpersuasion of the jury, never shifts, but remains with the affirmative throughout the case. A presumption is a rule of law, attaching to a given state of evidentiary facts certain procedural consequences as to the duty of the production of other evidence by the opponent.

The 'effect of a presumption of law (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent.' The 'fallacy' of the Supreme Court in considering a presumption as a matter of evidence, in the case of Coffin v. U. S., 156 U. S. 432, is now generally rejected, even by the Supreme Court. (Citing authorities.)

"The presumption is founded upon the then state of the proof. It is always procedural. Thus, where the circumstances in evidence clearly and irresistibly lead to the conclusion of suicide, no presumption that the death was accidental arises. The plaintiff's case can receive no support therefrom. (Citing cases.)

"But as the court here charged the jury, where the facts and circumstances leave in doubt the question whether the death was by accident or suicide, then a presumption that it was accidental, founded upon observations of human nature and life as a whole, does arise. The effect of this presumption is merely that the plaintiff must recover, in the absence of evidence to the contrary from the opponent.

"This presumption, as such, would not survive the introduction of evidence tending to prove suicide or even motive for suicide. Thereafter it would have no place in the reasoning as a presumption; but, as a legitimate inference from human life, the effect would continue."

Compare these declarations in the Ross case, if the Court please, with the instructions in the case at bar.

Supreme Lodge, Knights of Pythias, v. Beck, 181 U. S. 49, 21 Sup. Ct. 532, 45 L. Ed. 741.

In this case, the question as to whether or not Beck committed suicide was open to conjecture, and the Court held that it was a question for the jury. There was no

evidence in that case that Beck placed the gun in his mouth. The evidence there was such that he might have stumbled and fell against the gun.

Wells Fargo Co. v. Mutual Life Ins. Co., 66 F. (2d) 890.

Counsel in their brief say that in the above case "the Court in its decision cited with approval the decision of Travelers' Insurance v. McConkey, 127 U. S. 661, and affirmed a judgment for the plaintiff." (Page 14.)

Counsel are in error, for the McConkey case is not even referred to in the above case, and it involved only the distinction between accidental death and death by accidental means.

New York Life Ins. Co. v. Miller, 81 F. (2d) 263.

Counsel quote from this case on page 15 of their brief. But this case involved a policy of life insurance, which contained an exception in the event of self-destruction.

> "If death from any cause except suicide is insured against, the burden is on the company to prove the exception; but if death from one specific cause, such as accident, is insured against, the burden is on the policyholder to show that the condition precedent to liability has taken place." (Jefferson Standard Life Ins. Co. v. Clemmer, 79 F. .....2d .....724.)

III.

On page 18 of Respondent's brief, we find the following:

> "We now desire to urge upon the Court that petitioner is not entitled to urge error in the giving of the instructions for the reason that exceptions thereto were not taken within the presence of the jury as provided by the rules of this Court and those of the Circuit and District Courts."

There is no merit to this contention, for the following reasons:

At the inception of the trial, the following inquiry was made by the court:

> "THE COURT: Is there any dispute as to where the burden of proof in this case is?
> "MR. POORE: We have our view,—it is on the plaintiff throughout the trial.
> "MR. MEYER: We have our view,—it is on the defendant as soon as the plaintiff has proven the death of Mr. Gamer resulted from violent and external means. The law presumes it was accidental.
> "MR. POORE: We dispute that as a matter of law and would be glad to furnish your Honor authority to support our position.
> "THE COURT: Very well." (38 R.)

The Court requested counsel for plaintiff and defendant to submit to the Court proposed instructions, and in accordance with such request counsel for the plaintiff submitted their proposed instructions numbered 1, 2, 3, 4, 5 and 6 (249-251 R.), and the defendant tendered its proposed instructions numbered by the Court 7, 8, 9, 10 and 11. (251-253 R.)

At the close of the evidence, and after the motion for a directed verdict had been made and overruled, the Court said:

> "THE COURT: So that the attorneys in the case now on trial may know what the law as given by the Court may be on the main issues involved in this case, it is ordered" that certain specified instructions so proposed will be given, and certain instructions so proposed are by the Court amended and given as amended, and certain instructions so proposed are refused. (See Record 243 to 253.)

As soon as the Court had indicated the instructions which were to be given and those refused, the following occurred:

> "MR. POORE: What time do we make a record on the instructions?
>
> "THE COURT: If you wish to take any exceptions, now is the time to take them.
>
> "MR. POORE: We desire to take them, your Honor." (244-245 R.)

Counsel for defendant then dictated into the record defendant's exceptions to the instructions which the Court said it would give, and excepted to the refusal of the Court to give its proposed instructions. (245-248 R.)

The case was argued to the jury by counsel for the respective parties, and the Court then instructed the jury, as it had previously stated it would, and the charge so given will be found at pages 253-268 of the record.

Upon concluding its charge, the Court stated:

> "The jury will retire in charge of the bailiff." (268 R.)

"Immediately after the Court had directed the jury to retire in charge of the bailiff, and as the jury was leaving the box, J. A. Poore, one of counsel for defendant, arose, and the Court inquired if the defendant had any exception to the charge of the Court. Mr. Poore answered: 'Yes, Your Honor,' and immediately and while the jury was retiring proceeded to and did commence to dictate into the record but did not conclude the following exceptions to the charge of the Court:

"MR. POORE: Comes now the defendant in this cause and reiterates and re-asserts the same objections to the instructions given which it heretofore asserted in the initial partial settlement of the instructions as shown by the record. And the defendant now, in addition, makes the following objections and takes the following exceptions to the instructions of the Court as given to the jury:" (269 R.)

Then follows in the record the exceptions so taken. (See record 269-274.)

The Court then inquired: "Has the plaintiff any exceptions to the charge?" And Mr. Meyer, one of counsel for plaintiff, replied: "No, Your Honor." (274 R.)

The record then shows: "That thereafter, the jury retired to consider of their verdict, and subsequently—at 8:10 p. m. on November 14, 1935,—returned into court with their verdict." (274 R.)

The record, therefore, clearly shows that the rule of Co rt was fully complied with by defendant in the taking of its exceptions. Defendant did all that it could do to preserve its record. The Court stated what instructions it would give and those it would refuse before arguments were made to the jury, and exceptions

were duly noted thereto. The jury was then instructed, in the manner in which the Court had indicated, and as soon as the Court had concluded its instructions counsel for defendant reiterated the same objections theretofore made to the instructions, and again in detail excepted thereto.

In the case of United States v. Gotlieb Breitling, 20 U. S. (How.) at page 252 decided by Chief Justice Taney, it was objected that an exception was not taken in time. The Court said:

> "It is always within the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it. The attention of this Court has, upon several occasions, been called to this subject, and the rule established by its decisions will be found to be this: the exception must show that it was taken and reserved by the party at the trial, but it may be drawn out in form and sealed by the judge afterwards. And the time within which it may be drawn out and presented to the court, must depend upon its rules and practice, and on its own judicial discretion."

And in Elijah Phelps v. Jacob Meyer, 15 How. 160; 14 L. Ed. 643, the Court said:

> "It has been repeatedly decided by this court, that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. The statute of Westminister 2nd, which provides for the proceeding by exception, requires, in explicit terms, that this should be done; and if it is not done, the charge of the court, or its refusal to charge as requested, form no part of the record and cannot be carried before the appellate court by writ of error. It need

not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear, by the certificate of the judge who authenticates it, to have been so taken. Nor is this a mere formal or technical provision. It was introduced and is adhered to for the purposes of justice. For if it is brought to the attention of the court that one of the parties excepts to his opinion, he has an opportunity of reconsidering or explaining it more fully to the jury."

In the case of Hickory v. United States, 151 U. S. 303; 14 Sup. Ct. Rep. 334, 339; 38 L. Ed. 170 (decided 1894), Mr. Chief Justice Fuller speaking for the Court said:

"The rule in relation to exceptions to instructions is that the matter excepted to shall be so brought to the attention of the court before the retirement of the jury as to enable the judge to correct error, if there be any, in his instructions to them; and this is also requisite in order that the appellate tribunal may pass upon the precise question raised without being compelled to search the record to ascertain it. . . . The trial judge could not have been in doubt as to the particular part of the charge objected to, and, as his attention was called to the matter before the jury retired, could have modified or withdrawn it if he had thought it necessary to do so; and the portion is excepted to with sufficient precision, so far as this court is concerned."

In Merchants' Exch. Bank v. McGraw, 76 F. 930 (9th Circuit), decided Oct. 19, 1896, the Court said:

"The proper practice is to inform counsel that, if they desire to take any exceptions to the charge, it must be done before the jury retires. It will always be sufficient if the exceptions be taken and noted at the time with sufficient certainty."

In the case of Price v. Pankhurst, 53 Fed. at page 312 (8th Cir.), it is said:

> "It is the duty of the party excepting to call the attention of the court distinctly to the parts of the charge excepted to, and this must be done before the cause is finally submitted to the jury, to the end that the court may have an opportunity to correct or explain the parts of the charge excepted to, if it seems proper to do so. . . . It is, of course, the duty of the court to allow the parties reasonable time and facilities for specifying exceptions. There is no occasion for haste in charging the jury. No part of the trial should be conducted more deliberately and carefully, and no court will refuse a party time and opportunity to point out distinctly his exceptions to the charge before the case is finally given to the jury. He must be afforded opportunity to do this then, because he is precluded from doing it afterwards."

In the case of Owens v. United States, 130 Fed. 279 (9th Cir.), Judge Ross said:

> "The record shows that the instructions to the jury were in the form of a written charge, covering 18 pages of the printed transcript. We do not at all question the general rule that, in the absence of a statutory provision or a valid rule of the court to the contrary, exceptions must be taken and entered prior to the return of a verdict, in order to entitle them to consideration by an appellate court.
>
> "The record shows that the trial commenced on Aug. 13, 1902, and terminated Saturday, August 16, 1902. After the attorneys for the respective parties had closed their arguments to the jury, the court instructed the jury in writing; and, as the members of the jury were filing out of the court-house, the attorney for the defendant stepped forward to the judge of the court, and said to him that he wished to except to portions of the charge, but that it was

impossible for him to intelligently do so until he could take the instructions and examine them, and thereupon inquired of said judge whether he had any rule of court as to the manner of taking exceptions to instructions,—to which the judge responded that he had no rule on the subject, and for counsel to adopt such practice as he might be advised was proper. The next day (Aug. 17th) was Sunday, and defendant's attorneys prepared a motion in arrest of judgment, a motion for a new trial, and written exceptions to the charge of the jury, and on that day handed to the judge a copy of the exceptions, and to the clerk of the court originals of the exceptions to the charge and the motions in arrest and for a new trial, with instructions to the clerk to file the three papers on Monday, the 18th of August, which was done accordingly."

The record further shows that the trial court entertained the exceptions, and overruled them.

"The trial judge therefore remained satisfied with the charge, notwithstanding the exceptions, and, of course, would not have changed it, had they been actually filed at the time the charge was delivered.

"Relying, as he did, on the response of the court, and handing to the court, as he did the next day, his exceptions in writing, which the latter entertained and considered on the motions for a new trial, we do not think they ought to be disregarded on the ground that they were not filed in time to allow the trial judge to consider his charge and 'give new and different instructions.' In the somewhat similar case of Ah Lep v. Gong Choy, 13 Or. 211, 9 Pac. 483, the Supreme Court of Oregon applied the maxim that 'an act of the court shall prejudice no man.'"

In the case of Manuel Zeno Gandia v. Pettingill, 222 U. S. 452; 56 L. Ed. 267; 32 Sup. Ct. 127, decided

January 9, 1912, opinion by Mr. Justice Holmes, the Supreme Court of the United States said:

> "An exception was taken to the judge's sending the jury out before the counsel for the defendant had stated all of his exceptions to the charge. The judge had told the counsel that he would not instruct the jury otherwise than as he had, and he allowed all the exceptions to be taken in open court after the jury had retired.
>
> "No doubt it is the stricter practice to note the exceptions before the jury retires (the judge, of course, having power to prevent counsel from making it an opportunity for a lost word to them.) Phelps v. Mayer, 15 How. 160, 14 L. Ed. 643. But in this case they were noted at the trial, in open court (United States v. Breitling, 20 How. 252, 15 L. Ed. 900) and in the circumstances stated the defendant suffered no wrong, so that we should not sustain an exception upon this ground."

And in the case of Dalton v. Moore, 141 Fed. 311, the Court, speaking through Judge Morrow, stated as follows:

> "It is further objected by the defendants in error that this court cannot consider the exceptions taken by the plaintiffs in error to the instructions given to the jury by the lower court, for the reason that the exceptions were not taken until after the jury had retired to consider their verdict; citing the cases of Western Union Tel. Co. v. Baker, 85 Fed. 690, 29 C. C. A. 392; Yates v. United States, 90 Fed. 57, 32 C. C. A. 507, and Thiede v. Utah, 159 U. S. 522, 16 Sup. Ct. 62, 40 L. Ed. 237. . . .
>
> "The verdict of the jury was returned and entered of record November 28, 1903. The objections and exceptions were allowed on December 10, 1903, and filed December 18, 1903. A motion for a new trial was made immediately upon the entry of the verdict, and was denied on July 22, 1904. The instructions

to the jury were given near the close of the term, and it appears to have been the opinion of the court that the case should be concluded before the end of the term at midnight, in order that the regularity of the proceedings should be preserved. To accomplish this purpose, the court, before the case was closed, permitted counsel to take his exceptions afterwards that the jury might take the case without delay. The questions involved in the instructions were well understood by the court and counsel, and there was no misunderstanding as to the instructions that were given and refused, or the exceptions that counsel desired to take thereto. We think the plaintiffs in error cannot be deprived of their exceptions to the charge to the jury by the action of the court. Ah Lep v. Gong Choy, 13 Or. 211, 9 Pac. 483."

Petition for Certiorari denied by Supreme Court of the United States, Feb. 19, 1906, 200 U. S. 619, 50 L. Ed. 623, 26 Sup. Ct. Rep. 757.

As stated by the Supreme Court of the United States (Hickory v. United States, 151 U. S. 303, 14 Sup. Ct. Rep. 334, 339, 38 L. Ed. 170), the purpose of the rule relating to exceptions to instructions is first that the matter excepted to shall be brought to the attention of the Court before the retirement of the jury so as to enable the Judge to correct error, if he deems there is any, in his instructions to them, and second that the appellate court may pass upon the precise question raised without being compelled to search the record to ascertain it.

Both of these conditions are met by the record here.

The Court called upon counsel for the respective parties to submit proposed instructions, and this was done, and the Court stated which instructions so proposed it would

give and which it would refuse. (243-253 R.). Prior thereto, and at the very inception of the trial, the Court had inquired if there was any dispute as to where the burden of proof rested, and was advised by counsel for the defendant that it was upon the plaintiff throughout the trial, which assertion was denied by counsel for the plaintiff. (38 R.) Authorities were submitted to the Court by counsel for respective parties.

While the Court was indicating which of the proposed instructions it would give and which it would refuse, the following inquiry was made by one of counsel for defendant:

> "MR. POORE: What time do we make a record on the instructions?"
>
> "THE COURT: If you wish to take any exceptions, now is the time to take them."
>
> "MR. POORE: We desire to take them, your Honor."

And counsel for the defendant then did dictate into the record the specific exceptions and objections it had to the instructions which the Court stated it would give, and its exception to the refusal of the Court to give certain requested instructions. (244-253 R.) This was all done before the case was argued to the jury. (253 R.)

After the case was argued to the jury, the Court stated: "The jury will retire in charge of the bailiff," and immediately thereafter J. A. Poore, one of counsel for defendant, arose, and the Court inquired if the defendant had any exception to the charge of the Court. Mr. Poore answered: "Yes, Your Honor," and proceeded to immediately dictate into the record such exceptions while the jury was in the act of retiring, and

the first statement made by counsel was that he "reiterates and re-asserts the same objections to the instructions given which it (defendant) had heretofore asserted in the initial partial settlement of the instructions as shown by the record," and then stated the balance of his objections and exceptions. All of the exceptions were by the court overruled, and exceptions noted. (269-274 R.)

It is, therefore, apparent that the trial court had knowledge of the exceptions taken by defendant, and overruled them, and this even before the jury had retired. The record also clearly indicates the instructions given and refused, and the exceptions taken thereto, so that this Court will not be required to search the record therefor.

Further, it is universally held by this Court that on certiorari to review a decision of the Circuit Court of Appeals, matters not relied on as a basis for the petition will not be considered.

Alice State Bank v. Houston Pasture Co., 247 U. S. 240, 38 Sup. Ct. 496, 62 L. Ed. 1096;

Burnet v. Commonwealth Imp. Co., 287 U. S. 415, 53 Sup. Ct. 198, 77 L. Ed. 399;

Hubbard v. Tod, 171 U. S. 474, 19 Sup. Ct. 14, 43 L. Ed. 246;

Gunning v. Cooley, 281 U. S. 90, 50 Sup. Ct. 231, 74 L. Ed. 720;

Helvering v. Taylor, 293 U. S. 507, 55 Sup. Ct. 287, 79 L. Ed. 623;

Charles Warner Co. v. Independent Pier Co., 278 U. S. 85, 49 Sup. Ct. 45, 73 L. Ed. 195;

Merchants Universal Joint Co. v. Culhane, 57 Sup. Ct. 81, 81 L. Ed. 25.

Respectfully submitted,

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